

## APPELLATE CIVIL.

Before Mr. Justice Mosely, and Mr. Justice Dunkley.

## MA DUN MAI v. MAUNG SAN TUN.\*

1937

Dec 14.

*Burmese customary law—Desertion of husband by wife—Automatic dissolution of marriage—Wife's share in hnayazon property—Desertion followed by adultery—No forfeiture of rights without suit for divorce—Husband entitled to whole property only on decree on ground of adultery in suit for divorce—Husband's own decision as to wife's fault—Claim of deceased husband's heirs on proof of wife's misconduct—Divorce, a personal action of husband.*

According to Burmese customary law, when a woman deserts her husband the marriage becomes automatically dissolved at the end of one year after desertion, but she does not thereby forfeit all her right in the joint property of the marriage even if adultery is alleged against her. The joint property must be divided on the footing that the marriage had become dissolved by desertion, and the share of the deserting wife therein is one half.

In a properly constituted action for divorce, where the cause of action is the adultery of the wife, the husband, if successful in establishing the adultery, has a right to a decree declaring him to be entitled to the whole of the joint property. But he cannot of his own accord decide that his wife has been guilty of a grave matrimonial fault and enforce the consequence of that alleged fault. Still less, where a husband has taken no steps in his life-time to assert his rights in a Court of law, can his heirs be allowed after his death to make a claim before a Court to the whole of the joint property by bringing evidence of the wife's misconduct during her husband's life-time.

Burmese customary law recognises that divorce is essentially a personal action.

*Maung Yin Maung v. Ma So*, (1897-1901) 2 U.B.R. 34, explained and approved.

*Ma Me Hla v. Maung Po Thon*, I.L.R. 7 Ran. 98; *Ma Nyun v. Maung San Thein*, I.L.R. 5 Ran. 537; *Maung Po Nyun v. Ma Saw Tin*, I.L.R. 5 Ran. 841, followed.

*Ma Kin v. Maung Po Sin*, I.L.R. 6 Ran. 1, dissented from.

*Maung Tok v. Ma Kin*, (1892-96) 2 U.B.R. 116; *S.A.S. Chettyar Firm v. U Maung Gyi*, I.L.R. 14 Ran. 329, overruled.

*E Maung* for the appellant. The point for determination is the effect of desertion by a Burmese Buddhist wife for a period of one year or over, coupled with adultery, on her rights in the property of the marriage. The same problem was considered in

\* Civil Second Appeal No. 215 of 1937 from the judgment of the Court of the Assistant District Court of Bassein in Civil Appeal No. 37 of 1937.

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*S.A.S. Chettyar Firm v. U Maung Gyi* (1) ; but that decision requires reconsideration. The wife, who has been guilty of desertion only for the period of one year, does not lose all rights in the joint property of the marriage. The decision to the contrary in *Ma Kin v. Maung Po Sin* (2) conflicts with the earlier decision of the Privy Council in *Maung Po Nyun v. Ma Saw Tin* (3). No doubt, the Privy Council was dealing with the case of the husband's desertion, but the arguments apply equally to the wife's desertion. The fact that the wife has, in addition, been guilty of adultery does not affect the question. In *Maung Tok v. Ma Kin* (4), it was held that a wife who has committed adultery loses her right of inheritance in the husband's estate ; but the texts cited do not support the proposition. In *S.A.S. Chettyar's* case the essential difference between the husband's actively seeking a divorce with forfeiture, and an automatic dissolution of marriage was not taken into consideration. See the remarks of Heald J. in *Ma Me Hla v. Maung Po Thon* (5). Adultery by the wife is an offence, which the husband may condone ; it is an offence against the husband personally, and he alone can take action for the offence ; and even the husband loses the right to take action after the marriage tie has terminated. See Digest, II, 329, 416, 452, 453 and 454.

*Kale* for the respondent. Digest, II, 256 and 259 imposing forfeiture on the wife whom the husband divorces for her incontinence should be read together with Digest, II, 395. There is no difference in essence between a divorce, consciously sought, and an automatic dissolution of marriage ; in either case, the status of husband and wife is put an end to. The

(1) I.L.R. 14 Ran. 329.

(2) I.L.R. 6 Ran. 1.

(3) I.L.R. 5 Ran. 841.

(4) (1892-96) 2 U.B.R. 116.

(5) I.L.R. 7 Ran. 98.

penalty which the *Dhammathats* attach to the wife, who has committed adultery, should be the same in whatever way the marriage is terminated.

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DUNKLEY, J.—The defendant-appellant was the wife of one U Khwe Ket, deceased. The plaintiff-respondent is the grandson and sole heir of U Khwe Ket. He sued for a declaration of title to a holding of agricultural land. The facts found by the lower Courts, whose findings of fact are binding on us, are that this holding was acquired during the coverture of the appellant and U Khwe Ket; that about 8 or 9 years ago the appellant left U Khwe Ket and has since then been cohabiting with another man named Maung San Baw; and that 3 or 4 years after the appellant ran away with Maung San Baw U Khwe Ket died. Relying on the decision of a Full Bench of this Court in *Ma Nyun v. Maung San Thein* (1), the lower Courts rightly held that the marriage between the appellant and U Khwe Ket became automatically dissolved at the end of one year after she left U Khwe Ket, and, relying on the case of *S.A.S. Chettyar Firm v. U Maung Gyi and another* (2), they have held further that the appellant forfeited all her right in the *hnafazon* property of her marriage with U Khwe Ket on account of her adultery with Maung San Baw, and have given the respondent a decree declaring his title to the whole of this holding of land.

Before us, on behalf of the appellant, it has been urged that the decision in *S.A.S. Chettyar Firm v. U Maung Gyi and another* (2) is an incorrect statement of the law in so far as it lays down that, where a marriage is dissolved on account of the wife's desertion followed by her adultery, she forfeits her share in the *hnafazon* property to her husband. It follows a decision of the

(1) (1927) I.L.R. 5 Ran. 537.

(2) (1936) I.L.R. 14 Ran. 329.

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Judicial Commissioner of Upper Burma in *Maung Tok v. Ma Kin* (1), where it was held that under Burmese Buddhist Law a wife who is unfaithful to her husband forfeits whatever rights she had although there may have been no formal divorce. The case of *Maung Yin Maung v. Ma So* (2), another Upper Burma case, was also relied on in *S.A.S. Chettyar Firm's* case (3), but, in my opinion, *Maung Yin Maung's* case (2) does not support such a wide interpretation of the law.

The principal texts of the *Dhammathats* relating to the consequences of divorce on the ground of adultery are set out in the judgment in *S.A.S. Chettyar Firm's* case (3), and it is therefore unnecessary for me to repeat them in this judgment. What the rules in the *Dhammathats* really lay down is this, that if the wife is proved to be guilty of adultery the husband shall have the right to divorce her and take the whole of the joint property of the marriage (*vide* Manugye, Book XII, section 43, penultimate clause). This is the proposition laid down in *Maung Yin Maung v. Ma So* (2), and with this proposition I find myself in agreement. It seems to me that on the texts it cannot be denied that in a properly constituted action for divorce, where the cause of action is the adultery of the wife, the husband, if successful in establishing the adultery, has a right to a decree declaring him to be entitled to the whole of the *hnaphazon* property. But the much wider contention, which, with all due respect, appears to me to be implicit in the judgment in *S.A.S. Chettyar Firm's* case (3), that, because a woman leaves her husband and the marriage is dissolved at the end of one year on account of her desertion and the husband thinks her to be guilty of adultery, he can take the whole of the joint property of the marriage, is a startling proposition from

(1) (1892-96) 2 U.B.R. 116.

(2) (1897—1901) 2 U.B.R. 34.

(3) (1936) I.L.R. 14-Ran. 329.

which I must dissent. It makes the husband the judge in his own cause, and he cannot be permitted to decide that his wife has been guilty of a grave matrimonial fault and to enforce the consequences of that alleged fault of his own volition. The further proposition that, when a husband has taken no steps in his life-time to assert his rights in a Court of law, his heirs can be allowed after his death to make a claim before a Court to the whole of the joint property by bringing evidence of the wife's misconduct during her husband's life-time, is even more startling. Burmese Buddhist Law recognizes that divorce is essentially a personal action and the penalties for adultery can be enforced only by the husband (*vide* U Gaung's Digest, Volume II, sections 416 and 454).

With the greatest respect, in my opinion, the learned Judge in *S.A.S. Chettyar Firm v. U Maung Gyi* (1) misdirected himself by the use of the expression "automatic divorce", occurring in his judgment (1). His actual conclusion was that in the case of a *divorce* on account of the wife's adultery the wife loses all her right in the *hnapazon* property. I have no doubt as to the correctness of this proposition, but there was no *divorce* in the case which was before him. The expression "automatic divorce" is a contradiction in terms. Divorce is the legal dissolution of marriage by a Court or other competent body or according to forms recognized in the country, nation, or tribe. All that was decided in *Ma Nyun v. Maung San Thein* (2) was that on the expiry of a certain period after desertion by one party the marriage is dissolved, *i.e.*, comes to an end; the marital state between the parties ceases to exist. That is a very different thing from divorce. With great respect, I think that the matter was rightly stated by

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(1) (1936) I.L.R. 14 Ran. 329, 330.

(2) (1927) I.L.R. 5 Ran. 53

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Heald J. in *Ma Me Hla v. Maung Po Thon* (1), the head-note of which case reads as follows :

“ There is no authority for the view that adultery on the part of the wife *ipso facto* puts an end to the marriage.

Except when put to an end by mutual consent or as a result of desertion for a certain period, marriage subsists until it is dissolved by the Court ; and village elders are, it seems, not competent to effect divorce against the will of one of the parties, on proof of such misconduct as may be sufficient to satisfy them.

If a divorce by mutual consent is proved, partition of property must be on that basis, even if one of the parties had been guilty of misconduct.”

In the present case, the husband not having brought an action for divorce against the appellant on account of her adultery, the marriage was brought to an end by the appellant's desertion and not by her adultery, and therefore the rights of the appellant and her deceased husband's heirs to the joint property of the marriage must be decided in accordance with the law for the division of that property on the marriage becoming dissolved by desertion.

In *Ma Kin v. Maung Po Sin and three* (2) a Bench of this Court held that in the case of a divorce through desertion the deserting party must forfeit all his or her interest in the property of the marriage, but it is clear that when the Bench pronounced their decision, on the 8th August, 1927, they were unaware of the decision of their Lordships of the Privy Council in *Maung Po Nyun v. Ma Saw Tin* (3), which was pronounced on the 26th July, 1927 ; and in view of this latter decision the decision of the Bench of this Court cannot be considered to be a correct statement of the law. In *Maung Po Nyun v. Ma Saw Tin* (3) their Lordships held that the view that as the

(1) (1929) I.L.R. 7 Ran. 98. (2) (1927) I.L.R. 6 Ran. 1.

(3) (1927) I.L.R. 5 Ran. 841.

appellant had been guilty of desertion, the respondent was entitled to the whole of his property, was not supported by any text or authority, and they dissented from this view and confirmed the decree of this Court dividing the property in accordance with justice, equity and good conscience, having regard to the general rules of Burmese Buddhist Law. The effect of the decision in *Maung Po Nyun v. Ma Saw Tin* (1) therefore is that when a marriage is dissolved by the desertion of the wife she does not lose her interest in the joint property of the marriage; and, in my opinion, even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. Consequently, in the present case the appellant is entitled to a half share of the holding in question.

The judgments and decrees of both the lower Courts are therefore set aside, and instead thereof the plaintiff-respondent will be granted a decree declaring his title to a half share of the holding of land in suit. As the plaintiff-respondent has been partially successful each party will bear his (or her) own costs throughout.

MOSELY, J.—I agree.

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